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13

14 UNITED STATES DISTRICT COURT  
15 DISTRICT OF NEVADA – LAS VEGAS  
16

17 STEVEN KLEIN, WILLIAM J.  
BROOKSBANK, DONAVON  
18 JOHNSON, KEVIN BURK, JACK  
WHISLER, and JOSEPH F. MANNIX,  
19 individually, and on behalf of all other  
similarly situated,

20 Plaintiffs,  
21

22 v.

23 FREEDOM STRATEGIC PARTNERS,  
LLC, JOVAN VERCEL, JR., KENNETH  
M. WIDNER, FREEDOM WIRELESS,  
24 INC., DOUGLAS V. FOUGNIES, and  
LARRY L. DAY,  
25

26 Defendants.  
27  
28

Case No. 2:08-CV-01369-PMP-PAL

**DEFENDANTS FREEDOM  
WIRELESS, INC., DOUGLAS V.  
FOUGNIES AND LARRY L. DAY'S  
REPLY IN SUPPORT OF MOTION  
TO DISQUALIFY TIFFANY &  
BOSCO, P.A. AS COUNSEL FOR  
PLAINTIFFS**

[Complaint Filed: August 29, 2008]

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendants Freedom Wireless, Inc. ("Freedom Wireless"), Douglas V. Fournies, and Larry L. Day (collectively, "Defendants") respectfully submit this Reply memorandum in support of their Motion to Disqualify Tiffany & Bosco, P.A. as Counsel for Plaintiffs [Dkt. 184] ("Motion"). Defendants' Motion requests that the Court disqualify the law firm of Tiffany & Bosco as counsel for Plaintiffs based on ethical violations committed by a Tiffany & Bosco attorney, who improperly sought out and reviewed inadvertently produced and facially apparent attorney-client privileged communications and attorney work product. Rather than meet their ethical obligations under the Nevada Rules of Professional Conduct to inform Defendants' counsel of this occurrence, counsel at Tiffany & Bosco instead sought out more, and complete copies, of the privileged communications. Although the sanction of disqualification is severe, for the reasons set forth below, in Defendants' Motion, the Declaration of Gregory P. Barbee [Dkt. 185], the Declaration of Christopher E. Hale [Dkt. 186], and the Declaration of Dan Harned [Dkt. 187], the Court should disqualify Tiffany & Bosco as counsel for Plaintiffs.

**A. Tiffany & Bosco Should Be Disqualified Because They Failed To Comply With Required Ethical Standards Of Practice, And The *Meador* Factors Do Not Suggest Otherwise**

As an initial matter, Plaintiffs' Opposition [Dkt. 198] mischaracterizes the *Meador* analysis as a six-part balancing test. As the court in *Richards* explained, the *Meador* analysis was simply a set of six different factors that the court used as a framework for applying the recognized standards for disqualification to the particular facts of the case. *See Richards v. Jain*, 168 F. Supp. 2d 1195, 1205 (W.D. Wash. 2001). The recognized standards, applied to the facts of this case, support Tiffany & Bosco's disqualification. The Court should not view Tiffany & Bosco's actions any more favorably when simply reorganized under the six factors of the *Meador* analysis. Moreover, as the court in *Meador* explicitly stated, the six factors are not an exclusive list of the important

1 considerations. *In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998). Defendants will address  
 2 each of Plaintiffs' arguments under the *Meador* analysis.

3  
 4 **1. Tiffany & Bosco Knew, Or Should Have Known, That The Materials**  
 5 **Were Privileged**

6 Throughout both their Opposition and the supporting declaration of Mr.  
 7 Christian, Plaintiffs inconsistently describe Tiffany & Bosco's review of Defendants'  
 8 privileged documents. At various points in their papers, Plaintiffs state that no one at  
 9 Tiffany & Bosco reviewed privileged materials [*see* Opposition 10:22-23], but that Mr.  
 10 Christian reviewed the materials on the first CD produced by Mr. Harned closely enough  
 11 to determine that "[t]he CD appeared to contain spreadsheets into which Mr. Harned  
 12 apparently attempted to import e-mails" [*see* Opposition 4:9-10; Christian Declaration, ¶  
 13 13]. In fact, Mr. Christian's communications with Mr. Harned subsequent to receiving that  
 14 CD contradict Plaintiffs' assertion that the information was incomprehensible; counsel at  
 15 Tiffany & Bosco knew exactly what they had received, and they were able to describe it  
 16 succinctly and accurately:

17  
 18 On the disk you sent me, there were eight work e-mail Excel  
 19 spreadsheets with eight different groups of e-mails. However,  
 20 on the PST file you sent me, only the e-mails on the first Excel  
 21 spreadsheet were included. Would you please send me the  
 22 seven remaining PST files for the seven remaining Excel  
 23 spreadsheet files?

24 [Harned Decl., ¶5, Ex. B.].

25 No matter whether Tiffany & Bosco's review of these files was "quick,"  
 26 "cursory," "perfunctory," or otherwise, it is not reasonably credible that Tiffany & Bosco  
 27 could conduct such a review to determine that the information was "unusable" and fail to  
 28 recognize the potentially privileged nature of hundreds of entries listing Defendants'  
 counsel as senders and recipients. Even a "cursory" glance at these files, screenshots of

1 which are included as Exhibit A to the Hale Declaration, belies Plaintiffs' assertion and  
2 shows that Tiffany & Bosco either knew, or should have known, that the materials they  
3 received and the materials they further sought out were privileged communications.

4  
5 **2. Tiffany & Bosco Did Not Notify Defendants That They Had Received**  
6 **Privileged Information**

7 Once counsel at Tiffany & Bosco knew, or should have known, that they  
8 received privileged communications, Rule 4.4(b) of the Nevada Rules of Professional  
9 Conduct required that they provide notification of this fact. Based on Mr. Christian's  
10 communications with Mr. Harned, Tiffany & Bosco should have provided this notice no  
11 later than May 20, 2009. [See Harned Decl., Ex. B.] Plaintiffs' counsel failed to provide  
12 such prompt notice and took no steps at that time to protect Defendants' privileged  
13 documents and communications. Instead, Tiffany & Bosco kept the materials for their  
14 own use, did not notify Defendants that Mr. Harned had produced *any* documents until  
15 June 4, 2009, misrepresented the extent of production by Mr. Harned, failed to provide a  
16 copy of a portion of the production until June 8, 2009, waited until Defendants complained  
17 about privileged documents in the production before notifying Defendants that Mr. Harned  
18 had produced *another* CD (produced weeks earlier) which Tiffany & Bosco had printed  
19 out, and only produced a complete set of Mr. Harned's production in response to this  
20 motion. [See Harned Decl. ¶¶ 3-5; Barbee Decl. ¶¶ 2-7.] Tiffany & Bosco's actions are  
21 the antithesis of the "prompt notification" required.

22  
23 **3. Tiffany & Bosco Reviewed Privileged Information**

24 While Plaintiffs insist in their Opposition and supporting papers that Tiffany  
25 & Bosco did not review the materials on the second CD produced by Mr. Harned,  
26 Defendants have no way to verify such assertions short of limited discovery allowed by the  
27 Court on this issue. Plaintiffs concede that counsel at Tiffany & Bosco, if only Mr.  
28 Christian, did review the first CD produced by Mr. Harned. As discussed above, Mr.

1 Christian's contemporaneous communications contradict Plaintiffs' current assertion that  
2 counsel at Tiffany & Bosco found the materials incomprehensible. Furthermore, the Excel  
3 spreadsheets were not the only privileged—and facially privileged—materials included on  
4 the first CD. In total, the first CD contained at least 13 privileged documents. One of  
5 these documents contained the marking  
6 "PRIVILEGEDANDCONFIDENTIALATTORNEYWOR" in the file name. [Hale Decl.,  
7 Ex. C.] Plaintiffs' Opposition does not dispute that, even if only Mr. Christian reviewed  
8 the files, the Court should impute his actions and knowledge to the entire firm at which he  
9 is employed, *i.e.*, Tiffany & Bosco. Therefore, Tiffany & Bosco reviewed privileged  
10 materials and, through its actions, either intentionally invaded Defendants' privilege or, at a  
11 minimum, treated it with gross indifference.

12  
13 **4. The Court May Review The Subject Materials *In Camera* To Determine**  
14 **Their Significance**

15 To show the Court the significance, and sheer amount, of the privileged  
16 materials that Tiffany & Bosco either reviewed or pursued knowing the materials'  
17 privileged nature, Defendants attached a log showing those documents from the Harned  
18 productions known to be privileged as of June 24, 2009. [See Hale Decl., Ex. C.] The  
19 Court may review the actual documents *in camera* to determine their significance. Even in  
20 cases where no prejudice results, however, courts (and in particular this Court) have not  
21 allowed this fortuitous outcome to shield attorneys who fail to uphold the standards of the  
22 profession. The Court must "take into consideration the fact that attorneys are officers of  
23 the court and have a duty to maintain the integrity of the legal profession." *Faison v.*  
24 *Thornton*, 863 F. Sup. 1204, 1216 (D. Nev. 1993) (declining to apply standards that would  
25 excuse an attorney's flagrant violation where neither party is prejudiced).



1           **5.     Defendants Were Not At Fault For Mr. Harned's Inadvertent**  
2           **Production**

3           Plaintiffs concede that a third party, Mr. Harned, produced the documents at  
4 issue. However, Plaintiffs have made a strained attempt to cast the blame for their  
5 counsel's unethical behavior on Defendants by comparing Mr. Harned's production to past  
6 discovery disputes and issues between the parties concerning subpoenas to third parties.  
7 As Plaintiffs note, Defendants have previously opposed, either by motion or through the  
8 meet and confer process, Plaintiffs' attempts to obtain privileged and confidential materials  
9 from third parties. However, these third parties either had a current relationship with  
10 Defendants or Defendants had reason to believe that the third parties possessed such  
11 privileged and confidential materials. In contrast, Mr. Harned is a former employee of  
12 Defendants, and even *he* did not know that he had any materials dating back to his  
13 employment, let alone privileged communications between Defendants and their counsel.  
14 [See Harned Decl., ¶¶ 3, 6.]

15  
16           Plaintiffs provide absolutely no support or foundation for their suggestion  
17 that Defendants "likely" waived privilege by not pre-screening a former employee's  
18 production of documents in response to a subpoena. Not only would such a proposition be  
19 entirely inconsistent with the law concerning inadvertent disclosure, waiver, and the  
20 protections afforded attorney-client communications, but the Federal Rules of Civil  
21 Procedure include a provision to remedy precisely such a situation. *See* Fed. R. Civ. Proc.  
22 45(d)(2)(B). In any case, Defendants were not at fault for the inadvertent production, and  
23 the Court should disregard Plaintiffs' attempts to cast blame elsewhere than where it lies –  
24 on its counsel, Tiffany & Bosco.

1           **6.     While Plaintiffs Might Suffer Some Prejudice, This Alone Cannot Shield**  
 2           **Their Counsel From The Repercussions Of Unethical Practice**

3           Defendants do not dispute that Plaintiffs will suffer some prejudice as a  
 4 result of the disqualification of one of the three law firms currently representing Plaintiffs.  
 5 However, the question the Court should address is whether the prejudice is undue given  
 6 the extent of Tiffany & Bosco's ethical violation. Defendants also note that, since  
 7 Plaintiffs purport to be represented on a contingency basis, the particular amount of fees  
 8 that would otherwise have been incurred through Tiffany & Bosco's efforts is irrelevant.  
 9 Discovery is ongoing in this case, in which the Court has not yet even determined the issue  
 10 of class certification. No trial date has been set. There is nothing to suggest that Plaintiffs  
 11 could not obtain competent counsel to replace Tiffany & Bosco. Indeed, Plaintiffs already  
 12 have two other law firms representing them in this case.

13  
 14       **B.     Plaintiffs Ignored Defendants' Requests For Further Information Concerning**  
 15       **The Protection Of Their Privileged Materials, And No Formal Meet And**  
 16       **Confer Process Was Required**

17           In a last ditch effort to avoid disqualification of Tiffany & Bosco, Plaintiffs  
 18 mischaracterize Defendants' Motion to Disqualify as a discovery motion. Plaintiffs then  
 19 argue that Defendants' Motion should be denied because the parties did not meet and  
 20 confer pursuant to Local Rule 26-7, which governs discovery motions. Not so.

21  
 22           Based on the facts and evidence set forth in Defendants' Motion and  
 23 supporting papers, counsel at Tiffany & Bosco knew or reasonably should have known that  
 24 they received an inadvertent production of Defendants' attorney-client privileged  
 25 communications. Instead of notifying Defendants as required by the Nevada Rules of  
 26 Professional Conduct, Tiffany & Bosco sought out more and complete copies of those  
 27 privileged communications. Tiffany & Bosco took no steps to comply with ethical  
 28 standards until Defendants asked about the production, received the production from

1 counsel at Tiffany & Bosco and notified them that the production contained privileged  
2 communications. Tiffany & Bosco's actions led to the requested relief, which *does not*  
3 seek discovery relief. Defendants' motion cannot reasonably be characterized as a  
4 discovery motion, and it is not subject to the meet and confer requirements of Local Rule  
5 26-7.

6  
7           Nonetheless, Plaintiffs would have this Court ignore that Defendants, in fact,  
8 met and conferred about this Motion before filing. Before filing their Motion, and after  
9 Tiffany & Bosco had taken no further steps to address the issue since receiving  
10 Defendants' privilege log, Defendants requested that counsel at Tiffany & Bosco provide  
11 the following information so that Defendants could determine the extent of Tiffany &  
12 Bosco's invasion of the privilege: (1) the identity of each and every person who received  
13 and/or reviewed Defendants' privileged materials, (2) the steps taken to insure that no  
14 further invasion of the privilege could or would take place, and (3) exactly when and what  
15 Tiffany & Bosco received from Mr. Harned (including the form it was received in).

16  
17           Tiffany & Bosco ignored Defendants' simple requests, and Tiffany & Bosco  
18 did not provide a complete explanation of their actions until Plaintiffs filed their  
19 Opposition to Defendants' Motion. Given the gravity of the situation, the invasion of  
20 Defendants' privileges that had already taken place, the amount of Defendants' privileged  
21 information that was within Tiffany & Bosco's possession at that time, and the lack of any  
22 credible reassurance that Tiffany & Bosco had taken or would take proper steps to protect  
23 Defendants' privileged communications, Defendants properly brought this Motion.



1 **C. Conclusion**

2 For the foregoing reasons, and for those set forth in Defendants' Motion and  
3 supporting papers, Defendants respectfully request that the Court disqualify Tiffany &  
4 Bosco as counsel for Plaintiffs.

5  
6 Dated: August 17, 2009

Respectfully submitted,

7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

8  
9 By

/s/ Gregory P. Barbée

GREGORY P. BARBEE

Attorneys for Defendants

FREEDOM WIRELESS, INC.,

DOUGLAS V. FOUGNIES and LARRY L.

DAY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 333 South Hope Street, 43rd Floor, Los Angeles, California 90071-1448.

On **August 17, 2009**, I electronically filed the below named document(s) entitled:

**DEFENDANTS FREEDOM WIRELESS, INC., DOUGLAS V. FOUGNIES AND LARRY L. DAY'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY TIFFANY & BOSCO, P.A. AS COUNSEL FOR PLAINTIFFS**

with the Clerk of Court using the CM/ECF filing system. The foregoing document(s) was served via the United States District Court CM/ECF system on all parties or persons requesting notice:

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I certify that some of the participants are not registered CM/ECF users. The foregoing document will be deposited with the U.S. postal service on this date with postage thereon fully prepaid at Los Angeles, California, to the following non-CM/ECF participant:

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☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **August 17, 2009**, at Los Angeles, California.

/s/ Rose A. Jauregui  
Rose A. Jauregui